FILE COPY

No. 205

In The

Supreme Court of the United States

October Term, 1958

The Texas Mexican Railway Company,

Petitioner,

v.

Yeckes-Eichenbaum Inc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed the judgment of the United States District Court for the Southern District of Texas, Corpus Christi Division. The judgment was rendered on February 19, 1959, Rives, Circuit Judge dissenting. A Petition for Rehearing was denied by an order which was entered on April 16, 1959, Rives, Circuit Judge dissenting.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, which is reported in 263 Fed. (2) 791, is printed in Appendix A, infra, at page

2a. The opinion of the District Court, which is reported in 165 F. Supp. 204, is printed in Appendix B, infra, at page 12a.

JURISDICTION

The judgment of the Court of Appeals of the Fifth Circuit was entered on February 19, 1959. Rehearing was denied on April 16, 1959. This Honorable Court has jurisdiction of this cause by virtue of Title 28, U.S. Code, Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED

I.

After the District Court heard the complete testimony, made, at the request of the parties, a personal inspection of the manner in which similar cars were packed and loaded at the International Border and then entered judgment that the plaintiffs had not established the good condition of the commodity at the billing origin, the Court of Appeals was not authorized to disregard these findings, to substitute its own judgment and to rule that the mere execution of bills of lading without exceptions had created a presumption sufficient to sustain the burden of proof of good condition.

II.

Whether the action of the Court of Appeals, in disregarding the findings of fact and ruling of the District Court and in substituting its own judgment therefor, had the effect of extending the Carmack Amendment to include damages to carrier shipments originating in an adjacent foreign country in an unauthorized expansion of the transportation policy of the Congress of the United States.

STATUTE INVOLVED

The statutory provision involved is 49 U. S. Code Section 20 (11), 34 Stat. 595, 38 Stat. 1197, 39 Stat. 441, as amended.

STATEMENT

I.

One hundred forty-one railroad refrigerator cars (Appendix A, infra, p. 8a) were loaded with cantaloupes in the interior of Mexico and hauled approximately 850 miles until they entered the United States at Laredo, Texas (R. 177-178; Appendix A, infra, pp. 8a-10a). There, the doors on each car were opened and a doorway inspection was made without unloading. U. S. Department of Agriculture representatives made examination as to grade while railroad inspectors briefly noted whether any visible crates were broken and needed replacement or repair (R. 185-192). Only a small percentage of the crates in any car was visible for inspection (R. 139-142; R. 71; R. 185-193). The lading at the ends of the cars and in the lower layers was inaccessible and, therefore, not examined (R. 139-142; R-192).

New top ice was added by the shipper (R. 277) and new bills of lading were executed to cover the road haul to destination markets along the Eastern Seaboard (R. 101-105).

After each of the one hundred forty-one cars was unloaded at destination, breakage damage was ascertained and in each such instance, the delivering carrier paid respondents for the full actual loss less that fractional portion represented by the rato which the Mexican mileage bore to the total mileage (R. 53, 75; Appendix A, p. 11a). The settlement payments were then prorated among the participating American line-haul carriers on a mileage basis. As the Mexican railroads would not participate in the arrange-

ment, and could not be compelled to do so, the portion representing the Mexican mileage ratio was not paid (R. 69, 341-368; Appendix A, p. 11a.): This suit, which was brought under Title 28, U.S. Code, Section 1331 (R. 90-91), represents respondents' attempt to recover from the initial American line-haul carrier, and through it from the connecting American carriers, the fractional remainder of the asserted damages (Appendix A, p. 11a).

II.

Before the District Court refused to grant Respondents' motion for summary judgment (R. 79-88), he viewed the packing and loading methods employed by the importers and railroad carriers in the Laredo yards. This was done upon request of the parties (R. 87). Then, after an actively contested trial in which he had opportunity to hear the entire testimony and to observe the numerous witnesses (R. 114-371), the District Judge, sitting without a jury, entered findings of fact and rendered judgment for Petitioner (R. 529-536; Appendix B, pp. 22a-23a).

Upon Respondents' appeal to the Court of Appeals for the Fifth Circuit, the judgment was reversed and rendered in favor of the Respondents. The majority of that Court held, Circuit Judge Rives dissenting, that the introduction of the bills of lading executed at Laredo without exceptions as to apparent good order and condition made out a prima facie case in favor of Respondents and that the attendant presumption was to be overcome only by convincing proof to the contrary (R. 548-554; Appendix A, pp. 1a-7a). Judge Rives, on the other hand, felt that the burden rested on the shipper to prove delivery in good condition and that he could not say the District Court had erred in holding that the presumption of good order and condition at the time of delivery to the carrier had been overcome by the evidence (R. 555-559; Appendix A, pp. 8a-12a).

REASONS FOR GRANTING THE WRIT

I.

It is believed that the Court of Appeals committed substantial error in substituting its own judgment for that of the District Court which was based on fact findings supported by the testimony of Petitioner's witnesses. In so doing, it departed from the accepted and usual course of judicial proceedings to the extent that the exercise of this Honorable Court's supervisory powers is warranted. The basis of this assertion is contained in the decision of *McCaughn* v. *Real Estate Co.*, 297 U.S. 606, wherein this Honorable Court stated on page 608:

> "The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive. The Court of Appeals was without authority to weigh the evidence and to make its own findings."

The gravity of the error is noted when one contrasts its action with the attitude of the Court of Appeals for the Eighth Circuit as expressed in *Blackhawk Hotels Company* v. *Bonfoey*, 227 Fed. (2) 232 at 235:

> "Moreover, even in a trial to the Court, under Rule 52(a) of the Federal Rules of Civil Procedure, findings of fact can not be set aside unless they are without adequate evidentiary support or induced by an erroneous view of the law. . . . The jurisdiction of this Court is appellate and it has no right to retry the issues of fact or substitute its judgment with respect to such issues for that of the trial court. The findings of the trial court can not be set aside unless there is no substantial evidence to sustain such findings, or unless the findings are induced by an erroneous view of the law."

It converted findings of fact into a conclusion of law and, if the decision is not corrected, the entire transportation

industry, including motor carriers as well as railroads throughout the United States, will suffer its penalizing effect and will be unable to offer testimony and evidence to limit or overcome the presumptions available to shippers by virtue of the mere execution of bills of lading. Although Petitioner had six witnesses testify in its behalf (R. 114-371), the majority opinion erroneously suggested that:

> "The defendant offered no evidence whatever in contradiction of the bills of lading as to the condition of the shipments at Laredo." (Appendix A, p. 5a, note 6.)

The decision has placed an unjustified burden on Petitioner, on similarly situated rail carriers receiving shipments at international ports of entry and on the entire American railroad industry. The decision of the Court of Appeals, if permitted to stand, will have the effect of imposing a surcharge on every rail shipment of cantaloupes, lettuce, avocadoes, mangos and other perishables of all descriptions that enters the United States from Mexican origins. As there are annually several hundreds of such shipments, a substantial increase in lawsuits can reasonably be anticipated with a strikingly heavy financial burden on the American railroad industry.

II.

The unreasonable burden placed on Petitioner comes as the result of a Court ruling that seriously conflicts with the very recent opinion of the Court of Appeals for the Sixth Circuit in *Hoover Motor Express Company, Inc.* v. *United States of America*, 262 Fed. (2) 832, wherein that Court held for the carrier and stated at page 833:

> "It is established law that the burden rests on the shipper to prove delivery to the carrier in good condi-

tion. As to this feature of the case there was no evidence of probative value."

The shipper in that case had merely introduced the bill of lading which was similar to those with which this Petitioner was faced in the trial court. The Court of Appeals for the Sixth Circuit said at page 834:

"The bill of lading states that the goods were received 'in apparent good order * * *' (Contents and condition of packages unknown).' The bill of lading is not proof as to the condition of the contents of the crates, for the parenthetical phrase was an express limitation on the carrier's acknowledgment that the goods were received in good order (Citing cases). As stated in Tuschman v. Pennsylvania Railroad Company, 3 Cir., 230 F. 2d 787, 791, the statement in the bill of lading as to 'apparent good order' was prima facie evidence only that, as to parts which were open to inspection and visible, the goods were in good order at the point of origin. Here the parts were not visible and open to inspection."

The contrasting attitude of the Court of Appeals for the Sixth Circuit has been consistently maintained since *Ohio Galvanizing & Mfg. Co. v. Southern Pacific Co.*, 39 Fed. (2) 840, wherein it held at page 841 that:

"It is elementary that in order to establish liability on the part of a carrier for injuries sustained by merchandise while in its possession it is necessary to show, at least, that such merchandise was, when delivered to such carrier, in better condition than it was after receipt at destination. The burden was upon the plaintiff, claiming damages alleged to have resulted from such injuries, to prove, by a preponderance of the evidence, the extent to which the condition of such merchandise was better when it was received by the defendant than when it was delivered to the consignee."

Although in the case at bar the Respondents have failed to establish the amount of proof necessary to prevail in the Sixth Circuit in an action under the Carmack Amendment, the Court of Appeals for the Fifth Circuit in the instant case has reversed and rendered a judgment in favor of Respondents despite their conspicuous failure to fulfill such a standard of proof, thereby raising a serious conflict between United States Courts of Appeal concerning an important Federal law.

III.

Although the Petitioner unqualifiedly admits that the underlying shipments were subject to the Carmack Amendment for which it and its connecting carriers would be liable to the lawful holder of the bills of lading "for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which property may be delivered" (in this instance meaning American railroads only), it urges that the unjustified and summary action of the Court of Appeals has the effect of extending its liability to cover damage to property caused by prior foreign rail connections.

The decision of the Court of Appeals for the Fifth Circuit contrasts strikingly with the language of this Honorable Court in *Reider v. Thompson*, 339 U.S. 113, at 118, where it was very carefully stated:

> "We disavow, . . . , any intimation that our holding might impose liability on a domestic carrier for damage attributable to an ocean carrier."

Additionally, it is illuminating to observe that this Honorable Court then stated:

> "The complaint in this case alleges that the shipment was received by respondent in good order and condi-

tion and was damaged when delivered. Unless the petitioner can prove the case stated by his complaint, respondent is not liable."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

JUDGMENT

Extract from the Minutes of February 19, 1959.

No. 17455

YECKES-EICHENBAUM, INC., ET AL,

versus

THE TEXAS MEXICAN RAILWAY COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for appellants, Yeckes-Eichenbaum, Inc., and others;

It is further ordered and adjudged that the appellee, The Texas Mexican Railway Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissenting."

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17455

YECKES-EICHENBAUM, INC., ET AL,

Appellants,

versus

THE TEXAS MEXICAN RAILWAY COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(February 19, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

HUTCHESON, Chief Judge: Filed February 9, 1956, the suit was for damages to 146 carloads of cantaloupes, packed in wooden crates, shipped by rail from Laredo, Texas, to eastern markets, and sold by plaintiffs on a commission basis. Each of the bills of lading carried a notation that the described property was received in "apparent good order except as noted (contents and condition of contents of packages unknown) . . . S.L.C." (meaning shippers load and count).[1]

Upon arrival at their eastern destination each of the cars showed crate breakage which had caused damage to the

[1] 49 U.S.C. 101.

cantaloupes, and it was for this damage to the cantaloupes that plaintiffs sued. In other words, the action is generally what is referred to in the trade as a breakage claim which is customarily distinguished and separated from claims such as those due to the nature and condition of the commodity and losses occasioned by delay and market decline.

On January 15, 1957, interrogatories were propounded to plaintiffs, on February 13, 1957, plaintiffs filed a motion for summary judgment, and on February 20, 1957, answers to the interrogatories were filed. On February 25, 1957, the defendant filed a reply to plaintiffs' motion for summary judgment in which it urged that plaintiffs' motion for summary judgment be denied and that the court enter such a judgment for defendant. In the alternative, defendant asked that the case be set for hearing and for a determination; that there is no presumption of good order and condition arising from the introduction of the bill of lading; that the plaintiffs have not sustained their burden; and that judgment be entered for defendant.

Thereafter, on April 15, the district judge, filing a carefully stated and thoroughly reasoned opinion,[2] setting out the facts and giving his reasons therefor, denied the motion for summary judgment. Later plaintiffs having filed their first amended original complaint and defendant its answer thereto, the cause came on for trial before the judge without a jury, and, at its ending, the district judge made and filed an opinion[3] on the merits, incorporating therein by reference his opinion on summary judgment, in which he had held that the issuance of the good order bills of lading made out a prima facie case requiring the defendant to go forward with proof to overcome the presumption that the

[2] 165 F. Supp. 204-208.
[3] 165 F. Supp. 208-210.

shipments were in the condition described in the bills of lading.

In contradiction, however, of the principles therein stated, declaring that to impose on the carrier liability for the breakage observed at destination, plaintiffs were obligated to make further proof that each shipment was, as stated in the bills of lading, in good order and condition at Laredo, he held that on the evidence as a whole they had not sustained this burden. Basing this holding upon evidence offered by defendant, not as to the condition of the particular shipments in question but as to that of other shipments originating in Mexico and tendered, as these were, for carriage from Laredo, he held that, notwithstanding the good order bills of lading and the admitted fact of the existence of the breakage damage on arrival, the plaintiffs could not hold the carrier liable for that damage.

Appealing from the judgment giving effect to these conclusions, appellants are here urging that, in thus applying the law to the undisputed facts of this case and, upon evidence having no real relation to the issue in the case, the condition as to crate breakage of the particular shipments when received and accepted by defendant at Laredo, denying plaintiffs the benefit of the presumption attending the issuance of the bill of lading, the district judge departed from the law clearly and correctly stated by him in his opinion and deprived plaintiffs of the recovery to which, under the bills of lading and the evidence as a whole, they were, as matter of law, entitled.

For the reasons hereafter stated, we think that this is so and that the judgment must be reversed and here rendered for plaintiffs.

In his opinion on summary judgment, the district judge,

in accord with the law of the cases,[4] correctly held that the introduction of the bills of lading made a prima facie case. In his opinion on the merits, however, he incorrectly held that the evidence, that other Mexican shipments had arrived at Laredo with crates in damaged condition, overcame this presumption as to the shipments at issue. He thus gave effect to defendant's erroneous contentions: (1) that notwithstanding the fact that, as to it, the shipment originated not in Mexico but in Laredo, Texas,[5] where the cars were tendered to it and the bills of lading sued on were issued, the shipments must in effect be treated as though originating in Mexico; and (2) that evidence, opinion and otherwise, as to the condition at Laredo not of the shipments in suit but of others which had come from Mexico, overcame the presumption arising from the issuance of the bills of lading as to the condition of these shipments.

Nothing in any of the decisions cited by him or by the appellants lend support to this view. Indeed, all of the controlling decisions, many of which are collected in the note in 33 A.L.R. (2) at pages 872 et seq., note 4 *supra*, are to the contrary. That this must be so upon the record is made entirely clear by a brief consideration of the basic facts[6] of the case, in the light of the principles of carrier

[4] Louisiana Southern Ry. v. Anderson & Clayton, 191 F(2) 784; Kupferman v. United States, 227 F(2) 348; Reider v. Thompson, 197 F(2) 158; The Vallescura, 293 U.S. 296; City of Wichita Falls v. Lipscomb, 50 SW(2) 867; Missouri-Pacific v. Trautmann Bros., 301 SW(2) 240; T & P Ry. v. Empacadora de Ciudad Juarez, 309 SW(2) 926; Minn. Fire & Marine Ins. Co. v. B. & O., 53 NW(2) 828, 33 A.L.R. (2) 860 and note at 867.

[5] Cf. T & P v. Empacadora etc., note 4 supra.

[6] As material here these are:

While the cantaloupes had been shipped by rail from the interior of Mexico to Nuevo Laredo, upon arrival there the car doors were opened and samples taken by representatives

liability in circumstances of the kind as the cases cited in note 4, *supra*, and others like them have declared them.

> "No presumption exists that the goods were in good condition when delivered to the carrier. The presumption arises, however, from the fact of the receipt of the goods by the carrier without objection or exception noted in the bill of lading or shipping receipt, that as far as the condition was apparent on ordinary inspection, the goods were in good condition." 13 C.J.S. "Carriers", Sec. 254, p. 538.

In the Valiescura, 293 U.S. 296, where the Supreme Court held the carrier prima facie liable for damages which it

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of the U. S. Dept. of Agriculture and a representative of the Western Weighing and Inspection Bureau.

As also shown in the opinion, after inspection at Nuevo Laredo, the cars were taken through customs and domestic good order bills of lading were issued by defendant, each carrying the notation hereinabove referred to, and, upon arrival at destination, crate breakage was noted in each of the cars involved.

The defendant offered no evidence whatever in contradiction of the bills of lading as to the condition of the shipments at Laredo. Instead it undertook to rebut the presumption that the shipments were in good condition when accepted by the carrier at Laredo, which the bills of lading raised, not by evidence that the condition of these particular shipments was other than as stated in the bills but by evidence having no relation to and no tendency to prove the fact sought to be shown. This proof was opinion evidence (1) that the type of inspection made at Nuevo Laredo or Laredo was not such that any witness could tell with certainty that there was no breakage damage in it, and (2) that the only way of establishing that the crates were undamaged would have been to unload in Nuevo Laredo and inspect and reload, which can be done without too great an expense.

In addition the court found in the same way and from the same kind of evidence that it would be possible for considerable damage to exist, not visible or apparent from such inspection, and that generally there is more damage in Laredo in cars which are not unloaded than is visible, and, on the basis of this evidence alone, he found that the presumption relied upon by plaintiffs had disappeared.

did not show to have been caused by an excepted peril, the court said:

> "The carrier is charged with the responsibility for a loss which in fact may not be due to his fault merely, because the law in pursuance of a wise policy casts on him the burden to show facts to relieve him from liability."

In *Missouri-Pacific v. Trautmann*, note 4, *supra*, the court, holding that the shipper proved its prima facie case by introducing the bills of lading and proving its damages, said the burden was not on the shipper but was on the carrier to show what part of the damages was attributable to the shipper and what part to the carrier.

In this case, the carrier, presumably to save itself expense and trouble, elected not to make a more careful inspection of each of the crates in the cars, though it had possession of the cantaloupes all the time they were at Laredo, but to deliver its clean bills of lading. The only way it can avoid the effect of this action and these bills is to prove that the cantaloupes involved in these shipments had suffered breakage damage before the cars of cantaloupes were delivered to the carrier at the bridge in Laredo and having failed to make any proof on this point, the court's finding that it did is clearly erroneous, indeed it is without support in the evidence.

The presumption of a prima facie case is a substantial right of the shipper and is to be overcome only by convincing proof to the contrary. *Kupfermann v. U.S.*, 227 F. (2) 348. Appellee's reliance on T & P Ry. c. Empacadora et Ciudad Juarez, 309 S.W. (2) 926, will not at all do. Indeed when the difference between the nature and character of the damage claimed in that case and that claimed here is considered, the case is seen to be strong authority for appel-

lants' position here. Holding as it does, that except where the property carried is perishable property and the damage claimed is the result of inherent vice, plaintiff makes out a prima facie case by the introduction of a good order bill of lading, it states the law exactly as we have stated it here, where the damage claimed results from breakage of crates, a matter entirely different from spoilage due to inherent vice. The judgment should have been entered for plaintiffs. It is, therefore, REVERSED and here RENDERED for appellants.

RIVES, Circuit Judge, Dissenting:

Being in substantial agreement with the carefully considered opinions of the learned district court,[1] I respectfully dissent.

It is elementary that the burden rests on the shipper to prove delivery to the carrier in good condition before he can recover for the damaged condition of the shipment upon its arrival at destination. To meet that burden as to each of the 146[2] carloads of cantaloupes, the shippers relied on the bills of lading issued by the carrier at Laredo, Texas. Those bills of lading acknowledged receipt "in apparent good order and condition" of each of the cars described by initial and number, loaded with a specified number of "Jumbo crates cantaloupes origin in Mexico SL&C". "SL&C" means shipper's load and count.

The district court held "that the bills of lading here created a presumption that the crates and cantaloupes were in good condition, at least so far as could be determined by ordinary inspection, when received by defendant at Laredo and defendant has the burden of going forward with proof to overcome the presumption." 165 F. Supp. 204, 207. After

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[1] Reported in 165 F. Supp. 204 to 210.

[2] Actually 141 cars because it developed that five of the 146 did not move by the defendant carrier, and they were eliminated by agreement.

hearing the evidence, examining a small model car with removable top showing the manner of loading the crates and the limited opportunity for inspection, and making, upon the invitation of the parties, personal inspection of a number of cars of Mexican cantaloupes in Laredo, especially as to packing and loading, the district court made detailed findings of the evidence which it thought sufficient to overcome any presumption or prima facie case:

> ". . . that the type of inspection made at Nuevo Laredo, Mexico, or Laredo, Texas, is not such that any witness can look at a loaded car and tell that there is *no* breakage damage in it; indeed, the court believes from all the evidence that it would be possible for considerable damage to exist, not visible or apparent from such inspection; that the only way of establishing definitely that the cantaloupes were delivered in good condition and in undamaged crates is to unload in Nuevo Laredo, inspect and re-load, which can be done without too great an expense. The court further finds that generally there is more damage in Laredo in cars which are not unloaded than is visible; and, circumstantially, from the fact that this is true with reference to shipments generally, the court finds that there was more damage in the cars in question than was visible or apparent at the times the bills of lading were issued; at least that plaintiff has failed to show that there was not more damage than was apparent or visible at the time of the inspection. Damage from crate breakage is progressive and, even though there may be damage to the crates only at Laredo, and not always the melons, if the transportation is continued, damage to the cantaloupes will result. The court further finds that the presumption relied upon by plaintiffs disappeared in view of the evidence here and, circumstantially, that there is as much reason to believe that at least a proportionate part of all crate damage, and consequent damage to the cantaloupes, occurred in the transportation by Mexican

railroads to Nuevo Laredo as occurred after receipt of the cantaloupes by defendant at Laredo." 165 F. Supp. at p. 210.

The shippers knew that they, or their consignors, had loaded the cars at a point in Mexico approximately 850 miles from Laredo. The loaded cars were tendered by the shippers to the defendant carrier at Laredo. It was then physically impossible to look at a loaded car and tell whether the car contained no damaged crates. The carrier was authorized to insert in the bill of lading "SL&C", meaning shipper's load and count, and thereby to relieve itself from liability for damages caused by improper loading.[3] There was no testimony as to the condition of the crates or of the cars at the time they were loaded in the interior of Mexico.[4] When the defendant carrier acknowledged receipt of the shipments in Laredo "in apparent good order and condition," its admission extended no further than it said, namely, to the external appearance of the shipments: that is, from a reasonable inspection of the cars as loaded, they appeared to be in good order and condition. That seems to me to be the concensus of the holdings in nearly all of the cases which are collected in the annotation in 33 A.L.R. 2d 867-879.

There was no proof of anything peculiar about the handling of the 141 carloads of cantaloupes involved in this action. The evidence showed that the cost of an investigation to determine the cause of breakage damage in each particular car would probably be greater than the amount of damage. Accordingly, the American railroads, as a matter of expediency and business practice, have adopted a policy of prorating between themselves on a mileage basis the amount of the damage. The National Railways of Mexico

[3] 49 U.S.C.A. §101.

[4] Compare Chicago, N.W. Ry. Co. v. Whitnack Co., 1922, 258 U.S. 369, 372.

will not participate in any such proration. The defendant carrier in this case paid to the shipper that part of the breakage so allocated to the American line without prejudice to the right to sue for the part so allocated to the Mexican railroads and deducted from the breakage. To me that seems to be acting in a spirit of fairness. Further, I think the district court properly considered the methods of loading, packing and handling, the kind of inspection possible at Laredo, and the studies showing that in nearly all cases there was more breakage to the crates when the cars arrived in Laredo than could be ascertained by an ordinary inspection.

It was competent, I think, for the shipper and the carrier to contract upon the basis of the shipper's load in the interior of Mexico and the condition of the shipments apparent in the loaded cars when they arrived at Laredo. The carrier was under no duty either to require the shipper to unload and reload the cars before acceptance, or itself to do so after acceptance, in order to make a more complete inspection.

Under all of the circumstances of this case, I cannot say that the district court erred in holding that the presumption of good order and condition at the time of delivery to the carrier was a limited presumption, nor that its finding that that presumption had been overcome by the evidence was clearly erroneous.

I therefore respectfully dissent.

APPENDIX B

YECKES-EICHENBAUM, INC., ET AL.,

Plaintiffs,

v.

THE TEXAS MEXICAN RAILWAY COMPANY,

Defendant.

Civ. A. No. 1423.

UNITED STATES DISTRICT COURT
S. D. Texas,
Corpus Christi Division.
April 15, 1957.

On the Merits June 21, 1958.

ALLRED, District Judge.

Plaintiffs, (all having the same name) are corporations organized under the laws of New York, Pennsylvania and Massachusetts. Defendant is a Texas corporation.

The action is for damages to 146 carloads of cantaloupes, shipped by rail from the interior of Mexico through the port of Laredo, Texas, where domestic bills of lading were issued by defendant, consigned to eastern markets and sold by plaintiffs on a commission basis. The cantaloupes were packed in wooden crates and loaded on railroad cars in Mexico, no representative of defendant being present. They were not unloaded or reloaded in Laredo.

The bills of lading each carrying a notation that the described property was received "in apparent good order, except as noted (contents and condition of contents of packages unknown). . . . S.L.C." (meaning shippers load and count).[1] Upon arrival at eastern destinations crate

[1] 49 U.S.C.A. § 101 authorizes the carrier to insert in the bill of lading "Shipper's weight, load, and count," or other words of like purport to indicate that the goods were loaded by the shipper, and, if that be true, the carrier shall not be liable for damages caused by improper loading.

breakage was noted in each of the cars which had caused damage to the cantaloupes. Plaintiffs sue for this damage caused by the breakage.[2] Plaintiffs move for summary judgment under Rule 56(a), Federal Rules of Civil Procedure, 28 U.S.C.A.

Admitting that the burden is on them to show delivery to the carrier in good condition, arrival at destination in damaged condition and the amount of damages,[3] plaintiffs say they have made a prima facie case (as to liability) by introduction of the bill of lading showing receipt in apparent good order[4] and the admitted damage at destination, thus shifting the burden of proof to defendant to show bad condition when received by the carrier; that if the cars contained any breakage at Laredo, it was the duty of the railroad inspector to order repairs or refuse a "clean" bill of lading; that since defendant contends that part of the breakage existed at Laredo, defendant has the burden of segregating the damage, else it is liable for the whole.[5]

Defendant recognizes the general rule as to the prima facie effect of a bill of lading reciting that goods were received in apparent good order without notation of visible damage but says that the presumption is only that, *so far as is disclosed by ordinary inspection*, the shipment was in good condition, etc.; that under all the circumstances here, particularly the notation "S.L.C." on each bill of lading, there is no such presumption as contended for by plaintiffs;

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[2] The amount of the damage is not in dispute.
[3] Thompson v. McCarrick, 5 Cir., 205 F. 2d 897.
[4] 13 C.J.S. Carriers § 254, p. 538; Louisiana Southern Ry. Co. v. Anderson Clayton, 5 Cir., 191 F. 2d 784; Tuschman v. Pennsylvania Railroad Co., 3 Cir., 230 F. 2d 787, 791.
[5] 13 C.J.S. Carriers § 79, p. 154 and various authorities cited by plaintiffs which defendant says are not applicable.

that the general rule is that when the shipper loads the car for transportation, as here, he assumes responsibility for all defects in loading which are necessarily invisible to the carrier's agent or cannot be discerned by ordinary observation or such inspection as readily can be made;[6] that plaintiff has the burden of proving that the cantaloupes were in better condition at Laredo than at destination;[7] that, at most, the recital of apparent good condition "S.L.C." under the circumstances here, is not prima facie evidence that *all* the crates and cantaloupes were in good condition at Laredo but only that part visible to a superficial inspection;[8] that under a bill of lading "S.L.C." the shipper has the obligation of seeing that a car is properly loaded.[9]

A shipment originating in a foreign country, delivered to a common carrier in this country for transportation to destination under a domestic bill of lading is within the Carmack amendment. Reider v. Thompson, 339 U.S. 113, 70 S. Ct. 499, 502, 94 L. Ed. 698. However, in that case the court said:

> "We disavow, as did both the concurring judge and the dissenting judge below, any intimation that our holding might impose liability on a domestic carrier for damage attributable to an ocean carrier. *The complaint in this case alleges that the shipment was received by respondent in good order and condition and was damaged when delivered. Unless petitioner can*

[6] Blytheville Cotton Oil Co. v. Kurn, 6 Cir., 155 F. 2d 467.
[7] Tuschman v. Pennsylvania Ry. Co., footnote 4 supra; McNeely & Price Co. v. Ellerman & Bucknall S.S. Co., D.C. Pa., 100 F. Supp. 339.
[8] Cf. Ohio Galvanizing & Mfg. Co. v. Southern Pacific Co., 6 Cir., 39 F. 2d 840.
[9] Delphi Frosted Foods Corp. v. Illinois Central Railroad Co., 6 Cir., 188 F. 2d 343; South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., 4 Cir., 46 F. 2d 452.

prove the case stated by his complaint, respondent is not liable."[10]

The Reider case does not discuss the prima facie effect of the domestic bill of lading but the language quoted above emphatically reasserts the general rule stated in all the cases that the burden is on the shipper to prove delivery in good condition. From the opinion in the same case after re-trial,[11] it appears that the domestic bill of lading, issued at New Orleans after the ocean shipment from Buenos Aires, recited receipt "in 'apparent good order' • • • 'contents and condition of contents of packages unknown.'" Although the court says nothing about the prima facie effect of such a recital, it indicates that some proof was offered, probably by both sides. I quote:

> "(7, 8) The shipment in question followed an ocean shipment. Evidence was introduced to show that the exterior of the boxes was in good condition and that there were no water stains apparent at the time of the issuance of the bill of lading and transshipment. The bill of lading recited in 'apparent good order', but that the 'contents and condition of contents of packages (were) unknown.' These provisions are considered to relate to the external condition of the packages and do not establish the condition of the contents. However, when packages are received by the carrier in acknowledged good external condition but are delivered by the carrier in a damaged or stained condition which could reasonably and logically be found to indicate that the discovered damage or deterioration of the contents resulted from the cause indicated by the condition of the external package, theretofore received in good condition, the trier of facts may infer from

[10] Emphasis supplied throughout this memorandum unless otherwise indicated.

[11] Reider v. Thompson, 5 Cir., 197 F. 2d 158, 161.

these circumstances that damage to the contents was occasioned by the negligence of the carrier in the respect indicated by the changed external condition of the package. 'The outturn itself' may be considered as evidence. We, of course, do not anticipate the scope and effect of the evidence, or the weight and credit the trier of facts should accord it upon another trial when the testimony and all the circumstances of the case will be considered in the light of the applicable principles to which we have referred."

From unchallenged statements made in the briefs, it is clear: (a) that defendant had opportunity to inspect all cars and did inspect practically all of them either at Nuevo Laredo, Mexico, or Laredo, Texas;[12] (b) such inspections generally were made by a representative of an inspection agency (representing defendant and other carriers) who had authority to, and often did, require cars to be unloaded and repairs made to the bracing or crates; (c) that the packing, loading and bracing was done in Mexico, 800 miles south of Laredo, in accordance with the Freight Container Bureau Tariff; (d) that the crates are loaded in rows, three crates deep from each end of the car to the middle, where heavy bracing is installed; (e) upon arrival in Nuevo Laredo a few samples were taken from the top layers by representatives of the United States Department of Agriculture.

There seems to be little dispute between the parties as to the facts set out above, the principal difference being only as to the conclusions which should be drawn from the admitted facts. Defendant contends that the inspector at Laredo could see only one side of the crates in the doorway of the car and the upper side of the top layer of crates

[12] Nuevo Laredo is just across the Rio Grande from Laredo, Texas.

and then only if they are not covered by ice; that the top layer *is* covered with ice most of the time but, in any event, two-thirds of the crates are never seen at Laredo or Nuevo Laredo. Defendant says that under these circumstances, especially where the bills of lading contain an "S.L.C." notation, plaintiffs are not entitled to claim they have established prima facie that the cantaloupes were in good condition at Laredo, quoting from 13 C.J.S. Carriers § 254, p. 538, as follows:

> "No presumption exists that the goods were in good condition when delivered to the carrier. The presumption arises, however, from the face of the receipt of the goods by the carrier without objection or exception noted in the bill of lading or shipping receipt, that *as far as the condition was apparent on ordinary inspection* the goods were in good condition."[13]

It is to be noted that, notwithstanding the language emphasized by defendant above, the presumption does arise where the bill of lading recites receipt of the goods *without exception or objection*. "S.L.C." is not an exception as to *condition* of the crates or cantaloupes — it simply is an indication that they were loaded by the shipper, relieving the carrier of liability *caused by improper loading*. Here it is admitted that some of the crates and cantaloupes arrived destination in damaged condition and that the damage to the cantaloupes was caused by the damaged or broken crates. Whether this was caused by improper loading or rough transportation probably is the ultimate issue in the case.

The prima facie, or presumptive, effect of bills of lading with qualifications has received considerable attention but the weight of authority is best summed up, I think, in 33

[13] Emphasis by defendant.

A.L.R. 2d 872, as follows:

> "• • • That the issuance by a carrier of a bill of lading or shipping receipt which, containing no notation of visible damages or defects, does include an affirmative acknowledgment that on receipt the article or articles to be shipped were in 'good order' or 'apparent good order,' frequently accompanied by a qualification to the effect that the contents of the packages shipped were unknown, generally operates to create some kind of presumption or prima facie case in favor of the shipper or consignee seems clear. The form and limits of this presumption or prima facie case are, however, difficult to define with precision."

The second decision (197 F. 2d 158) in Reider v. Thompson, supra, is cited on page 876 of 33 A.L.R. 2d.

From all the foregoing, I am of the opinion that the bills of lading here created a presumption that the crates and cantaloupes were in good condition, at least so far as could be determined by ordinary inspection, when received by defendant at Laredo and defendant has the burden of going forward with proof to overcome the presumption, perhaps by proof of the nature set out in defendant's brief, from which deductions may be drawn. Of course, the burden of proof on the whole case, initially and finally, is on plaintiffs.

By invitation of the parties, the court has personally inspected a number of cars of Mexican cantaloupes at Laredo, especially as to packing and loading.

It is not necessary at this time to pass on plaintiffs' claim that defendant is liable for all damages unless it segregates the damage sustained in the United States from that sustained before the domestic transportation.

A jury having been waived, and the parties having agreed that the court shall hear the case in Laredo, a further pre-

trial is hereby set for Corpus Christi, May 2, 1957, at 2:00 P.M., at which time a trial date will be determined.

The Clerk will notify counsel.

On the Merits

Action by plaintiffs, foreign corporations, against defendant, a Texas corporation, for damages to 146 carloads of cantaloupes shipped by rail from the interior of Mexico through the port of Laredo, Texas, where domestic bills of lading were issued by defendant. The cantaloupes were consigned to eastern markets and sold by plaintiffs on a commission basis. They had been packed in wooden crates and loaded on railroad cars in Mexico and transported by the Mexican railroad approximately 850 miles to Nuevo Laredo, Mexico.

Upon arrival in Nuevo Laredo the car doors were opened and samples taken from a few crates by representatives of the United States Department of Agriculture. Generally the crates were covered, in whole or in part, with a layer of ice and a representative of the Western Weighing and Inspection Bureau generally looked into each car. If the bracing in the doorway, or any visible crate, needed repair, the shipper was required to do it then. The inspector could not see all, or even the greater part, of the crates, however; and, while most of plaintiffs' witnesses testified that from such inspection it could be determined whether there was any "material" damage, it was impossible to determine from such an inspection that *no damage* had been done to either the crates or the cantaloupes by such an inspection. None of the cars in question were unloaded at Nuevo Laredo for such inspection.

After inspections in Nuevo Laredo, the cars were taken through Customs and domestic bills of lading issued by defendant; each of them carried a notation that the de-

scribed property was received in "apparent good order except as noted, contents and condition of contents of packages unknown . . . S.L.C.," (meaning shipper's load and count).[1] Upon arrival at their eastern destinations, crate breakage was noted in each of the cars involved here which crate breakage had caused damage to the cantaloupes. It is for this damage to the cantaloupes, not the damage to the crates, for which plaintiffs sue here. In other words, this action is generally what is referred to in the trade "as a breakage claim," customarily separated from claims such as those due to the condition of the commodity or loss occasioned by delay and the market decline.

The following is quoted from plaintiffs' brief:

> "The cars involved in the present suit were sold by plaintiff on a commission basis. He sold each of the cars for the best price obtainable and after deducting a percentage of the amount received as his commission, plaintiff remitted the balance to the various consignors. If a car of cantaloupes which originated in the United States upon arrival in New York was found to contain two broken crates and in addition considerable decay in the remainder of the crates the practice has been for the receiver to file a breakage claim immediately with the delivering carrier. He would no doubt also protest the car on account of the decay and notify consignor who would probably at some later date file a claim on account of the condition. The breakage claim, however, would be more or less immediately paid to the receiver by the delivering carrier.
>
> "Since the extent of the breakage and the amount of the breakage claim is immediately agreed upon, it is customary for receiver to show on his account sales which he furnishes the shipper the amount of this breakage and to include such amount in remitting to the shipper. The receiver would then retain the pay-

[1] 49 U.S.C.A. § 101.

ment for breakage when received from the carrier. This was done by plaintiff in the present case. Plaintiff, in the belief that the carriers would pay these breakage claims in full, remitted the full amount of them to the various shippers. Consequently any recovery which might be had for the Mexico proportion rightfully belongs to plaintiff.

"For many years the carriers paid breakage claims in full regardless of where the car originated. Some years ago, the carriers stopped paying breakage claims in full on cars which originated in Mexico but instead they would, after an agreement between the delivering carrier and the consignee was reached as to the extent of the breakage damage, make an offer based upon a proration of mileage which the car traveled in the United States and in Mexico. For example, if a car moved from a point in Mexico 500 miles to the border and from the border to a point in the United States 1,000 miles, the carriers offered to pay two-thirds of the amount of the breakage. When this practice was initiated plaintiff refused to accept such offers as settlement in full. Thereafter an agreement between the various carriers and plaintiff was reached whereby the carriers agreed to pay and did pay the portion of the claim based upon the mileage traveled in the United States without prejudice to plaintiff's right to attempt to collect the balance of the claim."

Heretofore the parties moved for summary judgment, plaintiffs contending that the bills of lading showing receipt at Laredo in apparent good order made a prima facie case as to liability, thus shifting the burden of proof to the defendant to show bad condition when received by the carrier. Defendant, recognizing the general rule as to the prima facie effect of such a recital in a bill of lading, urged that such presumption was only that the shipment was in good condition *so far as could be disclosed by ordinary inspection*; that in view of the notation "S.L.C." there was

no such presumption as to that part of the shipments not visible; that plaintiff had the burden of proving that the cantaloupes were in *better condition* at Laredo than at destination and that "at most the recital of apparent good condition S.L.C." was not prima facie evidence that all of the crates were in good condition at Laredo.

The court overruled plaintiffs' motion for summary judgment in a memorandum dated April 15, 1957, here referred to and made a part hereof. The court held that while a shipment originating in a foreign country, delivered to a common carrier in this country under a domestic bill of lading was within the Carmack amendment, Reider v. Thompson, 339 U.S. 113, 70 S. Ct. 499, 94 L. Ed. 698, yet the burden was still on the plaintiff to show that the shipment was received at Laredo in good condition and was damaged when delivered; that receipt of the goods by the carrier, without exception or objection in the bill of lading, did create "some kind of presumption or prima facie case requiring the defendant to go forward with proof to overcome the presumption." Evidence has been heard by the court, and, by agreement of the parties, the court personally inspected certain cars of cantaloupes in Laredo while they were being readied for shipment to eastern points.

The court finds the evidence presented by defendant sufficient to overcome the presumption or prima facie case in favor of plaintiffs made by virtue of the recitals in the bills of lading; and that, therefore, the burden, which really has never shifted from plaintiffs, has not been met; that the type of inspection made at Nuevo Laredo, Mexico, or Laredo, Texas, is not such that any witness can look at a loaded car and tell that there is *no* breakage damage in it; indeed, the court believes from all the evidence that it would be possible for considerable damage to exist, not visible

or apparent from such inspection; that the only way of establishing definitely that the cantaloupes were delivered in good condition and in undamaged crates is to unload in Nuevo Laredo, inspect and re-load, which can be done without too great an expense. The court further finds that generally there is more damage in Laredo in cars which are not unloaded than is visible; and, circumstantially, from the fact that this is true with reference to shipments generally, the court finds that there was more damage in the cars in question than was visible or apparent at the times the bills of ladings were issued; at least that plaintiff has failed to show that there was not more damage than was apparent or visible at the time of the inspection. Damage from crate breakage is progressive and, even though there may be damage to the crates only at Laredo, and not always the melons, if the transportation is continued, damage to the cantaloupes will result. The court further finds that the presumption relied upon by plaintiffs disappeared in view of the evidence here and, circumstantially, that there is as much reason to believe that at least a proportionate part of all crate damage, and consequent damage to the cantaloupes, occurred in the transportation by Mexican railroads to Nuevo Laredo as occurred after receipt of the cantaloupes by defendant at Laredo.

The foregoing findings eliminate any necessity for discussion of the authorities cited by plaintiffs to the effect that if the loss or damage to goods is due partly to the negligence of the carrier it is liable for all unless it can show the amount due to its own negligence or which occured on its line. No negligence on the part of defendant has been shown other than the presumption of negligence which defendant here has refuted.

Judgment will be for defendant. The Clerk will notify counsel accordingly.

APPENDIX C

49 U. S. Code Section 20(11), 34 Stat. 595, 38 Stat. 1197, 39 Stat. 441, as amended:

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: . . . . . "